No. 903

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIS SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 4–17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1959. The petition for a writ of certiorari was filed on May 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was entitled to relief under 28 U.S.C. 2255 on an issue as to allegedly prejudicial remarks by the trial judge which had been raised on appeal.

STATEMENT

This case was previously before this Court on a petition for a writ of certiorari to review the affirmance of his conviction, raising essentially the same argument that petitioner raises here. See 252 F. 2d 120, certiorari denied, 357 U.S. 908 (No. 954, O.T. 1957).

Petitioner was convicted in the United States District Court for the Southern District of Florida of having obtained marihuana without payment of the transfer tax in violation of 26 U.S.C. (Supp. V) 4744(a) and sentenced to five years' imprisonment (R. 27–30).

When the case was called for trial, Mr. O'Quin, one of petitioner's two defense counsel, requested a list of the government witnesses (R. 34). The District Court denied the motion and the following exchange took place (R. 35–36):

> The COURT. It will be denied.
>
> You know the Federal Rules. The list of Government witnesses are not furnished in criminal cases for very cogent reasons, in my opinion. Some of them would probably disappear during the trial.
>
> Mr. O'QUIN. I don't see how the Court——
>
> The COURT. Here we have a narcotic case. Grave penalties are involved. There is a great temptation to interfere with witnesses.
>
> Mr. O'QUIN. The Government has ways of punishing them.
>
> The COURT. That doesn't bring back a fellow that might disappear some night. There are plenty of people in this court that would be

glad to interfere seriously with witnesses. I know you wouldn't do it.

It has been long settled in Federal cases that a list of witnesses is not furnished except in civil cases.

Mr. O'QUIN. All right, your Honor. We are ready for trial. We take exception to the Court's ruling.

After conviction, petitioner made a motion for a new trial contending that the statements by the court on the motion to produce government witnesses, allegedly made in open court in the presence of prospective jurors, were highly prejudicial. The motion was denied (Pet. 3). In affirming the conviction, the Court of Appeals noted, *inter alia,* that there was no showing that the judge's ruling was made in the presence of, or was audible to, anyone who later became a juror. 252 F. 2d 120. Petitioner filed a motion for a rehearing submitting affidavits of five jurors who sat on the case, stating that they had heard the court's remarks. The motion was overruled. Thereafter this Court denied a petition for a writ of certiorari. 357 U.S. 908.

Petitioner then filed a motion under 28 U.S.C. 2255 to vacate his sentence, alleging that the trial court's remarks, heard by at least five jurors, resulted in denial of a fair trial. He also asserted that the colloquy by the court and Mr. O'Quin (petitioner's counsel) accompanying the court's remarks disturbed Mr. O'Quin so much that he left the case to his associate who thereafter failed to protect petitioner's rights (R. 1–4). This motion was supported by affidavits of five jurors stating that they had heard the court's

remarks and also affidavits of petitioner and his wife to the effect that, after recess, Mr. O'Quin did not return but left the trial to his young associate (R. 4–20). The district court dismissed the motion without a hearing (R. 21). The Court of Appeals affirmed the district court's dismissal, one judge dissenting. It held that 28 U.S.C. 2255 would not serve as a "second effort to obtain an appeal on the merits on a ground that was insufficiently raised on the motion for new trial" and that the record revealed no lack of effective representation by counsel (R. 145–158).

ARGUMENT

Petitioner's contention that he was prejudiced by the trial court's remarks was previously presented to the District Court on a motion for new trial, to the Court of Appeals on appeal from his conviction and motion for rehearing, and to this Court on petition for certiorari and motion to supplement the record. On his motion to vacate his sentence under 28 U.S.C. 2255, he alleged no new facts or contentions. He supported his argument with affidavits of five jurors stating that they heard the trial judge's remarks. These, however, were before the Court of Appeals on the motion for rehearing and this Court on petition for certiorari and motion to supplement the record. It is not the function of a proceeding under 28 U.S.C. 2255 to relitigate issues which could have been, and in this case were, considered on appeal. See *Sunal* v. *Large*, 332 U.S. 174, 179. The dissenting judge below considered the allegations of prejudice serious enough to raise an issue of jurisdiction, cognizable on collateral attack. However, as this Court

stated in *Sunal,* even as to jurisdictional issues, relief has usually been denied when the appellate procedure was available for correction of error, even though the question was not raised. Still less is it available where the question raised on collateral attack was actually considered on appeal.

Actually, as pointed out in the government's prior brief in opposition (No. 954, O.T. 1957), the remarks of the trial judge did not constitute reversible error, and certainly cannot be deemed a jurisdictional defect. Although the judge, in denying petitioner's motion for a list of government witnesses, explained that this was done to avoid tampering with the witnesses, he pointed out at the same time that he knew that defense counsel would not do such a thing. None of the affidavits of the five jurors states that he considered the remarks as relating to petitioner or that he was prejudiced by them. Each states simply that he was present when they were made and that he heard them (R. 4–13).[1]

[1] Petitioner does not in this Court raise any issue as to alleged ineffective representation. Although Mr. O'Quin did leave the case just before the trial commenced, he did indicate to the court that the defense was ready for trial. There is nothing to show that his departure was occasioned by the remarks as to witnesses. It is reasonable to assume that Mr. O'Quin's associate, who had been present with him in the courtroom, was prepared to try the case. Other than Mr. O'Quin's departure petitioner has brought forth nothing indicating a lack of effective representation beyond a general allegation of error of judgment.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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